

A Part of the Constitution Is Unconstitutional, the Slovak Constitutional Court has Ruled

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The 30th of January 2019 will undoubtedly be remembered as a milestone day in the development of Slovak constitutional law, signaling the start of a new, second, stage of development. The first stage started on 1 September 1992 (the day of adoption of the Constitution of the Slovak Republic) and lasted until 30 January 2019. The second stage started with the Slovak Constitutional Court decision, of 30 January 2019, that an amendment to the Constitution is invalid for violating the material core of the Constitution.

Brief Summary of the Case

The proceedings before the Constitutional Court of the Slovak Republic, the result of which is the breakthrough decision in question, began in 2014 when the part of the Slovak Constitution dealing with judicial power was significantly amended. This constitutional amendment was followed by an amendment to the *Act on Judges*, implementing legislation, relating to the relevant part of the Constitution. In addition to other changes, the most important change introduced by the constitutional amendment in question was a requirement that judges be issued with security clearance – clearance issued by the National Security Authority (one of the executive branch bodies), following checks by that authority. The Judicial Council, the supreme authority on the legitimacy of the judiciary in the Slovak Republic, would have to assess judges' fitness for office on the basis of these security clearances. The primary reason the constitutional amendment was challenged before the Court was because the security clearances would be required also for judges already holding office, and not only for new candidates standing for judicial office.

A little more than four years after the beginning of the litigation challenging the constitutionality of these amendments, the Constitutional Court finally handed down its decision. Deciding not only on the constitutionality of the amendment to the *Act of Judges*, but also on the constitutionality of the amendment to the Constitution itself. The Court ruled that part of the 2014 constitutional amendment is contrary to article 1(1) of the Constitution. This article establishes the Slovak Republic as a democratic state and as a state based on the principle of rule of law. The commitment to democracy and the rule of law incorporates, according to the opinion of the Court, a commitment to the principle of division of powers and the principle of independence of the judiciary. These principles were held by the Constitutional Court to form part of the material core of the Slovak Constitution. The Court found that not only "ordinary" acts of the parliament but also its constitutional amendments must be in accordance with the material core of the Constitution. Thus, the Constitutional Court in effect

“created” a power to assess the conformity of constitutional amendments with the Constitution, a power which is not explicitly written in the text of the Constitution.

Material Core of Slovak Constitution

Whether or not the Constitution of the Slovak Republic can be regarded as having a material core has long been a topic of debate among Slovakian constitutional scholars. Some authors argued that the Slovak Constitution does not expressly provide that any part of it cannot be amended, and therefore that it has no material core. Others argued that the Slovak Constitution does have what might be called an implicit material core. If one accepted the existence of an implicit material core, that raised the problem of identifying the provisions of the Constitution that form this material core. The commitment to democracy and the rule of law (which are expressed in article 1(1) of the Constitution) were often put forward as likely to be regarded as the material core. The Constitutional Court itself has repeatedly, previously, noted the Constitution potentially had a material core, and to article 1(1) as its likely basis (for example, in a 2017 decision on abolition of presidential amnesties); clear confirmation of the priority of article 1(1) (as the material core) over other constitutional norms was however lacking.

Consequences of the Decision of the Constitutional Court

The Constitutional Court’s decision has been handed down just as public debate is focused on the process currently underway for the appointment of 9 new judges to the Constitutional Court itself (18 candidates are being considered for 9 vacant positions). In particular the focus has been on whether or not one of the candidates, former Prime Minister Robert Fico, meets the requirements for the number of years in legal practice that would make him eligible for consideration for a seat on the court. In such an atmosphere, the decision of the Court in question will either be mightily praised, or strongly criticized by constitutional academics, and probably within a very short time span. What is certain is that the decision will not be left without a response. While one could not possibly anticipate all consequences of such a breakthrough decision today, I will attempt to name just a few.

An immediate consequence is that the legislature will have to determine how it will implement the finding of unconstitutionality. The Slovakian legal framework currently only outlines the process for how parliament deals with the unconstitutionality of an “ordinary” act of parliament. One possibility is that the National Council (the parliament of the Slovak Republic), as a constitution-making authority, might be required to “repair” the Constitution within a six-month period, as it would do as a lawmaker in the case of correction of the unconstitutionality of “ordinary” acts of parliament.

Another consequence is the need to deal with the change from the classical dichotomy of a constitutional norm and an ordinary legal norm, into a new three-dimensional structure. The structure consisting of: (1) norms forming part of the

material core of the Constitution, (2) other constitutional norms, and (3) ordinary legal norms. The second category (other constitutional norms) is still the criterion for determining the constitutionality for the third category (ordinary legal norms). Since 30 January 2019 however, it has also become possible to review the constitutionality of the second category – with the first category (norms of the material core of the Constitution) the criterion for determining constitutionality. The problem of identifying the constitutional provision that underlies the norms of the first category is now overcome. The form of the legislation in which a norm is contained, is sufficient for identifying whether it falls within the second or the third category. Determining whether legislation aimed at constitutional amendment falls foul of the norms in the first category, however, will depend on the substantive content of the legislation. Something that will impact on this determination is the fact that the Constitutional Court did not define the content of the material core of the Constitution exhaustively. The Court only held that the commitment to democracy and the rule of law form the *basis* of the material core.

A consequence of the decision, which may however only be felt further down the line, will be a possible change in relationship between the Constitutional Court and the National Council. If the Constitutional Court is able to review the constitutionality of a constitutional amendment by the parliament, this presents an important change in the hierarchy of supremacy of state authorities. The Constitutional Court, on matters relating to the material core, has more authority than the National Council, which is defined by the Constitution as a legislative and constitution-making authority. If this trend of empowerment of the Constitutional Court and its judicial activism should continue, we could legitimately ask whether the commitment to democracy is really still being honoured. It might, in fact, be a case of the commitment to democracy being undermined in favour of the principle of rule of law, which is also expressed in article 1(1) of the Constitution. This denial, or at least a reduction in the importance of the commitment to democracy, is related to the way in which judges are appointed. The greatest weakness of the Constitutional Court, which is often raised in conflicts between the Court and the parliament, is the absence of any direct democratic legitimacy of the Court. Unlike the members of the National Council, the judges of the Constitutional Court are not elected directly by the People.

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